Supreme Court, U. S.
FILED
JUN 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

* * *

NO. 36, ORIGINAL

* * *

THE STATE OF TEXAS,

Plaintiff

V.

THE STATE OF LOUISIANA,

Defendant

* * *

BRIEF OF THE STATE OF TEXAS IN REPLY TO THE EXCEPTION FILED BY THE STATE OF LOUISIANA

* * *

OF COUNSEL

LARRY F. YORK
Attorney at Law
One Shell Plaza
Houston, Texas
77002

JOHN L. HILL
Attorney General of Texas

ELIZABETH B. LEVATINO
First Special Assistant
Attorney General

DANIEL O. GOFORTH
Special Assistant Attorney
General

P. O. Box 12548
Capitol Station
Austin, Texas 78711

ATTORNEYS FOR PLAINTIFF

June 1975

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

* * *

NO. 36, ORIGINAL

* * *

THE STATE OF TEXAS,
Plaintiff

V.

THE STATE OF LOUISIANA,
Defendant

* * *

BRIEF OF THE STATE OF TEXAS IN REPLY TO THE EXCEPTION FILED BY THE STATE OF LOUISIANA

* * *

The Report of the Special Master, Judge Robert Van Pelt, was filed in this Original action on April 14, 1975. The parties were given 45 days within which to file their exceptions, if any, to the Report and an additional 30 days to file their reply to any exceptions of other parties. The State of Texas accepted and urged approval of the Report, subject to two exceptions as set out in its brief filed with this Court May 29, 1975. No exceptions to the Re-

port of the Special Master were filed by the United States.

Louisiana filed the following exception to the Report of the Special Master and brief in support thereof:

> "Louisiana excepts only to that portion of the Special Master's Report which marks the boundary line between Texas and Louisiana through the geographic middle of the Middle Pass as Sabine River enters Sabine Lake, instead of in the geographic middle of the West Pass, thereby placing land admittedly in the State of Louisiana and on which taxes are presently being paid to Louisiana, in the State of Texas."

This brief of the State of Texas is submitted in reply to the exception filed by the State of Louisiana.

> THE SPECIAL MASTER CORRECTLY HELD THAT THE BOUNDARY BETWEEN TEXAS AND LOUISIANA WHERE THE SABINE RIVER ENTERS THE NORTHERN END OF SABINE LAKE IS THE GEOGRAPHIC MIDDLE OF THE MIDDLE PASS OF THE SABINE RIVER.

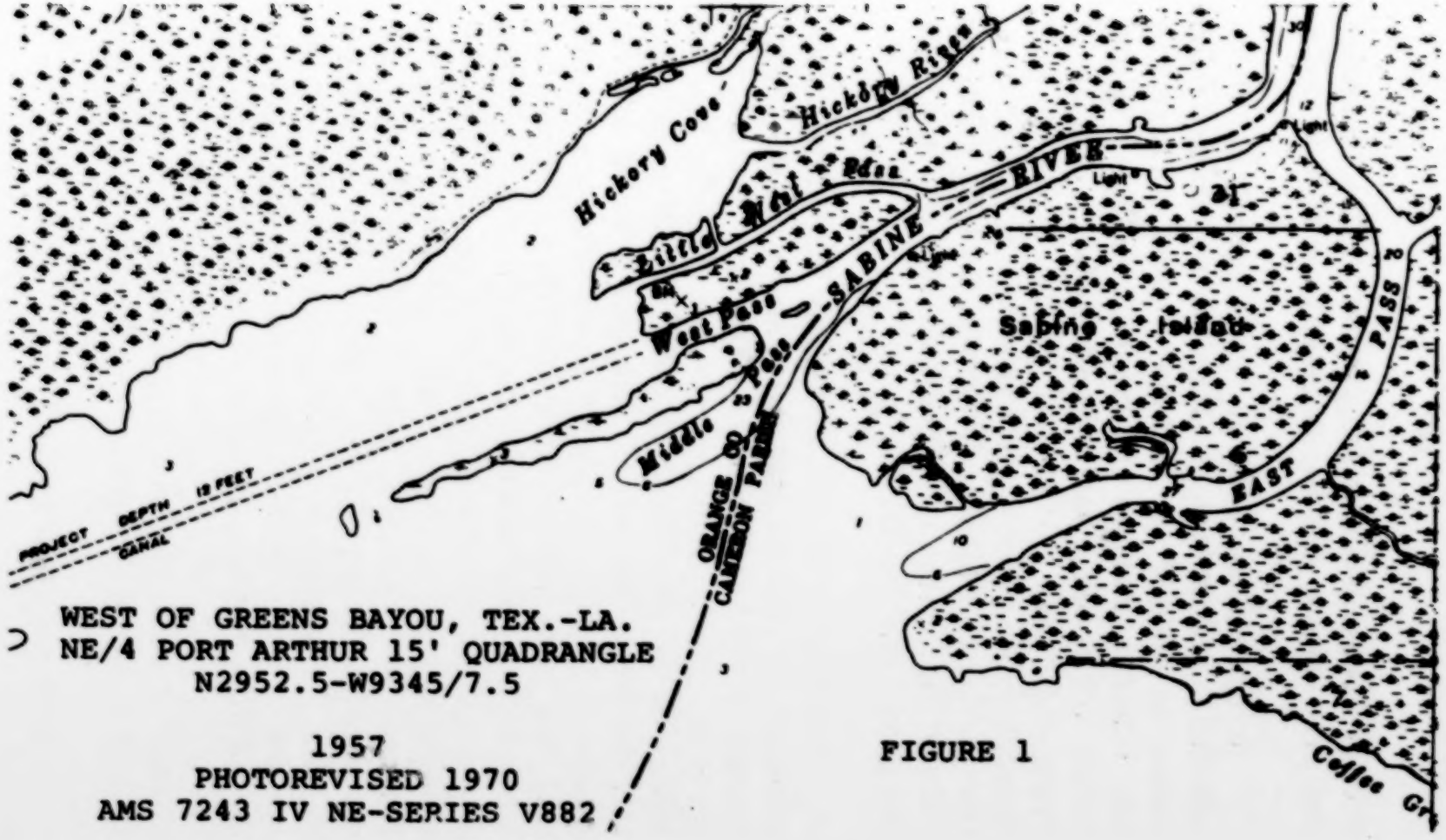
The Supreme Court in Texas v. Louisiana, 410 U.S. 702, 707 (1973), affirmed the holding of the Special Master that the boundary between Texas and Louisiana is the geographic middle of Sabine River but left for further deliberation the issue of the

precise location of that geographic middle, including the area where the River enters the Sabine Lake.

At the entrance of the Lake there are three islands. The principal island is the large island known as "Shell" or "Sabine" Island. There are two other islands to the west of "Sabine" Island which are at least partially artificial in origin. In bypassing these islands the River enters the lake through three passes. It was necessary, therefore, that the Special Master determine the location of the "River" at the head of Sabine Lake in order to locate the geographic middle.

The Special Master correctly made this determination by ascertaining the primary and historical course of the Sabine River as it entered Sabine Lake in 1848. As a basis for the decision the Master looked to the available evidence regarding the relative depths of the passes. See pages 9, 10, Special Master's Report. A review of this evidence showed that "the pass marked East Pass on Louisiana Exhibit EEE-1, and marked the Middle Pass on most of the subsequent exhibits, marks the true geographic middle of the river." Special Master's Report, page 9. See Figure 1, page 4. In making this recommendation the Master clearly was attempting to find the geographic middle of the river and did not use criteria such as navigation or the middle of the main channel as argued by the State of Louisiana. Indeed no evidence has been introduced as to which channel was utilized for navigation purposes by any type of seagoing vessels. As stated by the Master:

"Both maps particularly EEE-1 indicates



WEST OF GREENS BAYOU, TEX.-LA.
NE/4 PORT ARTHUR 15' QUADRANGLE
N2952.5-W9345/7.5

1957
PHOTOREVISED 1970
AMS 7243 IV NE-SERIES V882

FIGURE 1

> that a greater volume of water went down the east fork although the west fork as distinguished from the second west fork did carry a substantial amount of water. It is also apparent from these exhibits that the fork which Louisiana claims should be used in marking the geographic middle of the Sabine did not carry a significant flow of water. It seems to your Special Master that it would be inequitable to locate the geographic middle of the Sabine River in an insignificant channel lying to the west of where the main volume of the Sabine's waters flowed in 1850 and 1851 or now flows as shown by the aerial photographs." Special Master's Report, page 10. (Emphasis added.)

The geographic middle of the "Middle" pass is clearly the geographic middle of the "Sabine River"; the others are not.

Nonetheless, Louisiana argues that the geographic middle of the Sabine River as it enters the Sabine Lake must be determined by using the channel of the Sabine River which was used in locating the boundary by the Joint Commission for surveying the boundary between Texas and the United States in 1840. It is undisputed that when Texas was admitted into the Union in 1845 the eastern boundary of the State was on the west bank of the Sabine River. Since the waters of the Sabine River flow through all three passes, the west bank of the westernmost pass was the boundary of Texas in 1845. Because of the location of the boundary at this time, no deter-

mination was necessary as to the location of the geographic middle of the Sabine River as it entered Sabine Lake. However, since in 1848 the boundary was moved to the geographic middle of the Sabine River, the location of the geographic middle of the River and hence the boundary required resolution. This was the original purpose of this litigation and the Master has now correctly resolved the issue as to the geographic middle of the Sabine River as it enters the northern end of Sabine Lake.

Still, Louisiana argues that her alleged ownership of the island west of the middle pass or ownership by her citizens somehow requires a finding that the west pass is the boundary between the states. Louisiana erroneously bases her position on an opinion issued June 27, 1910, by the Assistant Secretary of the Interior (Plaintiff's Exhibit B, Item 1) holding that Louisiana owned an island lying in the Sabine River to the west of east pass.[1]

---

[1] In attempting to resolve ownership of the island, the Assistant Secretary as well as the states labored under the erroneous assumption that Louisiana could not own an island which was not within her territorial boundary. (Evidence of this mistaken assumption is initially found in Plaintiff's Exhibit B, Item 1, at Page 2.) Faced with the act admitting Louisiana to the Union and setting her boundary as a line beginning at the mouth of the River Sabine and drawn along the middle of said River, including all islands, and the 1838 Convention with the Republic of Texas establishing the west bank of the River as the eastern boundary of Texas and giving island ownership to the United States, as against Texas,

In resolving the question, the Assistant Secretary correctly recognized that:

> "The Supreme Court of the United States has the sole jurisdiction to finally determine the question of disputed boundaries between states. (Virginia v. Tennessee, 148 U.S. 503.) No decision that may be made herein would be binding upon the States." Plaintiff's Exhibit B, Item 1, page 7.

This particular boundary dispute between Texas and Louisiana has now been considered by the Supreme Court. Texas v. Louisiana, supra. Contrary to the assumption of the Assistant Secretary, this Court indicated that the United States owned all islands in the western half of the Sabine which existed in 1848, and may continue to own them even though located within the boundary of Texas.[2] The islands at the head of the lake were patented by the United States to Louisiana or to Louisiana inhabitants. See Louisiana Exhibit "EEE". Assuming arguendo that the islands were owned by the United States, it of

Footnote 1 cont.

the Assistant Secretary concluded that since the islands were given to Louisiana when admitted to the Union, a boundary between the United States and Louisiana necessarily would be in the westernmost channel. (Plaintiff's Exhibit B, Item 1, page 5.)

[2]The fact that the United States withdrew her claim to these islands because they had been patented to Louisiana is relevant to ownership only and does not affect any state boundary.

course had the authority to patent them to citizens of Louisiana. Consequently, it may be that Louisiana or its citizens own lands in the Texas half of the river. Ownership of the islands simply does not affect the boundary between Texas and Louisiana. Recognition of this fact was implicit in Louisiana's previous claim of ownership of "Sam" Island, which clearly lies west of Louisiana's boundary. As stated by this Court:

> "In the case before us, it is probably correct that only the eastern boundary of Texas was extended to the middle of the river in 1848 that State became entitled to any islands in the west half which formed after the date of that extension. But unless the 1848 Act conveyed to Texas the islands located in the western half of the river at that time title to those islands remained in the United States, if the United States had not previously conveyed all or part of them to Louisiana. The 1848 Act, however, does not mention islands in the Sabine, and it would therefore appear, if Lattig is to be followed, that the United States has an interest in any proceedings to determine the ownership of islands in the west half of the Sabine and should be a part to, or at least have the opportunity to participate in, such proceedings. Texas claims any such islands existing prior to 1848 by prescription and acquiescense, but, plainly, a State may not acquire property from the United States in

this manner. United States v. California, 332 U.S. 19, 39-40, 67 S. Ct. 1658, 1668, 1669, 91 L. Ed. 1889 (1947)." 410 U.S. at 714.

Thus, this court views ownership by the United States or Louisiana of islands physically within the boundaries of Texas as consistent with its holding of the boundary as the geographic middle of the River. Clearly the subsequent patent of these islands to Louisiana citizens would not change this holding. Louisiana, as well as Texas and the United States, have recognized this principle as shown by the numerous maps constructed by their respective agencies clearly showing the boundary through middle pass. See Special Master's Report, pages 10, 11; Texas Exhibit F, Items 5, 2, 33, 34.

CONCLUSION

For the foregoing reasons the State of Texas respectfully urges that the determination of the Special Master that the boundary between Texas and Louisiana where the Sabine River enters the northern end of Sabine Lake is the geographic middle of the Middle Pass of the Sabine River be adopted and approved as the judgment of this Court.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

ELIZABETH LEVATINO
First Special Assistant Attorney General

DANIEL O. GOFORTH
Special Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

ATTORNEYS FOR PLAINTIFF

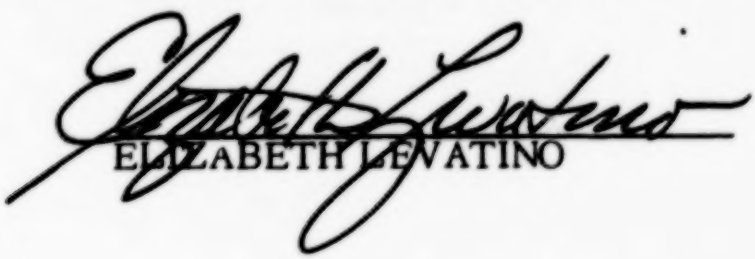
OF COUNSEL

LARRY F. YORK
One Shell Plaza
Houston, Texas 77002

June 1975

CERTIFICATE OF SERVICE

I, Elizabeth Levatino, First Special Assistant Attorney General of the State of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28th day of June, 1975, I served copies of the foregoing Brief of the State of Texas in Reply to the Exception Filed by the State of Louisiana, by transmitting conformed copies of the same by first class mail, postage prepaid, to the Special Master, the Office of the Governor and Office of the Attorney General, respectively, of the State of Louisiana, and upon the Solicitor General of the United States, and also upon the City of Port Arthur, Texas, through its City Attorney.



ELIZABETH LEVATINO